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**Pro hac vice* forthcoming

Counsel for Plaintiffs and the Proposed Class

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Jenny Houtchens and Samantha Ramirez,
individually, and on behalf of those
similarly situated,

Plaintiffs.

V.

Google LLC,

Defendant.

CASE NO. 5:22-cv-02638-BLF

**DECLARATION OF J. RYAN
GUSTAFSON IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO COMPEL
ARBITRATION AND MOTION TO
DISMISS**

Date: November 3, 2022

Time: 9:00 a.m.

Courtroom: 1

Judge: Hon. Beth Labson Freeman

1 I, J. Ryan Gustafson, hereby declare as follows:

2

3 1. I am a member at Good Gustafson Aumais LLP, one of the law firms representing the

4 Plaintiffs in this cause of action.

5 2. Upon information and belief, I understand that Fitbit currently markets and sells nine

6 models of Fitbit smartwatches and trackers online. *See*

7 <https://www.fitbit.com/global/us/products>. Notably, these devices are being sold under the

8 “Products” section of the website, as opposed to the “Technology” section.

9

10 3. It is only upon utilization of Fitbit products’ technology after the purchase of a Fitbit

11 product, by signing up for and creating a Fitbit account, does a consumer have any notice

12 of a putative arbitration agreement.

13 4. After the purchase of a Fitbit product, a consumer may sign up for and create a Fitbit

14 account without being forced to read Fitbit’s Terms of Service, or otherwise being aware of

15 a putative arbitration agreement.

16 5. Should a consumer elect to read Fitbit’s Terms of Service, a consumer must read 3,659

17 words before reaching Section 23 of the Terms of Service, which contains the putative

18 arbitration agreement.

19

20 6. Upon information and belief, a Fitbit product can be turned on and off, charged, and worn

21 without ever downloading the Fitbit app or creating a Fitbit account.

22 7. At the time a consumer purchases a Fitbit product, a consumer has no notice of or access to

23 any putative arbitration agreement.

24

25 8. Counsel for Plaintiffs have reviewed the external packaging of the following Fitbit

26 products: Versa 2, Sense, Charge 5, Versa 3, Ace 3, Luxe, Versa Lite, Charge 3, and Ionic.

27 Photographs showing the sides of the boxes for each of these products are documented in

28 Exhibits A through I, respectively. Said Exhibits are attached to this Declaration.

1 9. There is no reference to or mention of *any* disclaimers waiving legal rights on the external
2 packaging for each of the aforementioned Fitbit products. Specifically, there is no reference
3 to any putative arbitration agreement on the external packaging of the products documented
4 in Exhibits A through I.

5 10. Upon information and belief, there are no disclaimers or any arbitration language on the
6 external packaging of any Fitbit product that would provide a consumer with any notice
7 that they would be subjecting themselves to a putative arbitration agreement when making
8 their purchase.

9 11. Upon information and belief, Fitbit competitor, Samsung, prominently displays its
10 arbitration agreement on the external packaging of its Samsung Galaxy and Active
11 watches, as well as within the internal packaging. Exhibit J shows the arbitration agreement
12 consumers purchasing Samsung fitness trackers see when buying the product and the
13 arbitration agreement they see upon opening the product.

14 12. Counsel for Plaintiffs have observed consumers unboxing their brand-new Fitbit products,
15 still in packaging, and showcasing their device. Specifically, I have observed the unboxing
16 of the Ionic, Versa 2, Versa Lite, Charge 3, and Luxe devices.

17 13. Although the packaging slightly varies from product to product, notice of a putative
18 arbitration agreement does not. There is no notice of such agreement contained in any
19 internal Fitbit product packaging.

20 14. The only “paperwork” in the box are the setup instructions and the product/safety manual,
21 which is either buried below the packaging containing the device charger and can only be
22 accessed when one pulls out the separate compartment holding the product, or sealed in an
23 envelope within the packaging that could easily be overlooked and discarded.

24 15. No putative arbitration agreement or language regarding terms of service falls from the box
25 when the box is opened, nor is such putative arbitration agreement even buried within the
26

1 packaging.

2 16. Exhibits A-I and K attached to this Declaration shows how these products are packaged.

3 Noticeably absent from these photos is a putative arbitration agreement or notice of any
4 kind suggesting that purchase of such product may be subject to a putative arbitration
5 agreement.

6 17. The photos in Exhibit K illustrate the nonobvious manner in which Fitbit provides any

7 legal information to its consumers. Despite containing legal information in multiple
8 languages, none of the legal information provided on the outside packaging or within the
9 materials contained within packaging provides notice of or relates to a putative arbitration
10 agreement.

11 I declare under penalty of perjury that this Declaration and its corresponding exhibits are true and
12 correct.

13 15 Dated: September 15, 2022

16 /s/ J. Ryan Gustafson

17 J. Ryan Gustafson

18 *Counsel for Plaintiffs and the Proposed Class*